

"The defender's letter of 21st July was a distinct enough offer to sell sixty-eight shares of the Caledonian Insurance Company at £29, 5s. per share. The pursuer's letter of 23rd July was a distinct acceptance of that offer.

"To the pursuers' acceptance there was added, 'you will require to execute two transfers.'

"The defender says that this was a condition added by the pursuers, to which she did not consent; that the acceptance did not therefore exactly meet the offer; and that no contract was thus concluded. I think this quite a mistaken view of the pursuers' letter. The reference to two transfers was not a condition of the contract. It was a mere detail—a proposal—as to the manner in which the contract was to be carried out or executed, not in any way affecting the terms of the contract itself."

The defender reclaimed, and argued—There was no title to sue. If the pursuers were acting for a client they ought to have disclosed him, so that the defender, in the event of loss, might have the option of proceeding against either the client or the agent. Here the pursuers did not disclose the principal, and it appeared that they were buying the stock partly for themselves, as was shown by their desire to have two transfers granted. The action should have been at the instance of the principal—*Armstrong v. Stokes and Others*, July 6, 1872, L.R., 7 Q.B.D. 598; *Maspono y' Hermano v. Mildred Goyeneche & Company*, July 7, 1882, L.R., 9 Q.B.D. 530; *Bowes, &c. v. Shand and Others*, June 8, 1877, L.R., 2 App. Cas. 455. There was no contract. The bargain was for the sale of sixty-eight shares. The pursuers added a condition which the defender did not accept.

Counsel for the respondent was not called upon.

Without delivering opinions the Court adhered to the judgment of the Lord Ordinary.

Counsel for the Reclaimer—D.-F. Balfour, Q.C. —C. S. Dickson. Agents—T. & R. B. Ranken, W.S.

Counsel for the Respondents—Sir C. Pearson —Macfarlane. Agents—Waddell & M'Intosh, W.S.

Thursday, June 6.

## SECOND DIVISION.

[Lord Wellwood, Ordinary.]

REID v. SOMERVILLE & COMPANY AND  
OTHERS.

*Bankruptcy—Cessio—Citation—Wilful Absence*  
—*Bankruptcy and Cessio (Scotland) Act 1881*  
(44 and 45 Vict. cap. 22), sec. 9.

The Bankruptcy and Cessio (Scotland) Act 1881, sec. 9, provides—"If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum*."

In a petition for *cessio* a diet was fixed,

but before the date thereof it was agreed in view of certain concessions of the debtor that the diet should be continued *sine die*. In disregard of this agreement the agents for the petitioning creditor moved the Sheriff-Substitute to fix an adjourned diet, which was not intimated to the debtor, and to which he was not cited. At the adjourned diet decree of *cessio* was granted "in respect of no appearance by or for the defender." Held that the defender had not wilfully absented himself from the diet, and the decree reduced.

Opinion that an interlocutor granting *cessio* under section 9 of the Bankruptcy and Cessio (Scotland) Act 1881 should contain a finding that the debtor had wilfully absented himself from the diet.

On 8th February Messrs Somerville & Company, wine merchants, Leith, presented a petition for *cessio* in respect of a promissory-note for £50, 13s. 6d., granted by John Reid, publican, Barachnie, Lanarkshire, on which there was an expired charge without payment. The proceedings were instituted by the directions of Robert M'Caig, debt collector, who acted for J. Somerville & Company, and the local solicitors were Messrs Rose & Shearer, solicitors, Airdrie. When the petition for *cessio* was presented Reid was a notour bankrupt within the meaning of the Bankruptcy and Cessio Acts, not being able to pay his way at that time. But he was possessed of means which, when ultimately realised in March 1888, should have been sufficient to discharge all his outstanding liabilities, and to leave a considerable surplus.

A diet of Court was fixed for 28th February, to which the debtor was duly cited.

Reid consulted Mr D. Munro, accountant, Glasgow, in whose favour he granted certain trust conveyances, and in view of these it was agreed on 13th February, between Munro and M'Caig, that the diet fixed should be adjourned *sine die*.

In disregard of this arrangement, on the 28th February the agent for the petitioning creditors obtained a continuation of the diet till the 16th March. No intimation of this was made to the debtor, or to anyone on his behalf, nor was he cited to the adjourned diet. On the 16th March the Sheriff-Substitute (M'ARB) pronounced this interlocutor—"In respect of no appearance by or for the defender, deems the debtor John Reid to execute a disposition *omnium bonorum* to and in favour of Robert Burns M'Caig, accountant, Glasgow, who is hereby appointed trustee for behoof of the creditors of said debtor, dispensing with the trustee finding caution *hoc statu*."

Reid raised this action of reduction against Somerville & Company and M'Caig, and pleaded—" (1) Said decree of *cessio* having been obtained by the defenders in violation of the terms of the arrangement come to between the said D. Munro junior and the defender M'Caig, decree as concluded for ought to be granted. (2) The procedure in said petition of *cessio* having been illegal and disconform to the Cessio Acts and relative Acts of Sederunt, the said decree should be reduced in terms of the conclusions."

Proof was allowed, the import of which appears from the note by the Lord Ordinary

(WELLWOOD), who pronounced this interlocutor:—  
“In respect the late John Reid was not duly cited to the diet at which the decree of *cessio* under reduction was pronounced, and that no intimation of the said diet was made to him; finds, in the circumstances, that the said decree is reducible: . . . Therefore reduces . . . in terms of the conclusions of the summons,” &c.

“Note.—[After stating the facts and quoting the ninth section of the Bankruptcy and Cessio Act 1881]—It appears from the section thus quoted, which is the only statutory authority for granting decree of *cessio* in the absence of the debtor, first that the debtor must have been cited to the diet at which decree is pronounced; and secondly, that the Sheriff shall be satisfied that the debtor's failure to appear is wilful. It will be observed that the Sheriff does not state in his interlocutor that he was satisfied that the debtor's failure to appear was wilful. I shall hereafter consider whether it was necessary for him to do so; in the meantime I shall state as shortly as I can my views upon the proof which has been led. . . .

“The conclusions at which I have arrived on the proof are as follows:—*First*, I do not think that it is proved that the defender M'Caig undertook to abandon the *cessio* proceedings altogether. There is evidence on which it may be plausibly argued that he did so, but I do not think that he ever intended to do so, and I think that the bulk of the evidence goes to show that in point of fact he did not give such an undertaking. But—

“*Secondly*, I think it is quite clear that after obtaining from Reid a trust-deed in favour of himself (M'Caig) and Munro, M'Caig intended and undertook that the *cessio* proceedings should drop in the sense of being continued *sine die*, until it should be seen whether Reid's estate could not be satisfactorily wound up under the trust. If there was any doubt upon this point, it is made perfectly plain by M'Caig's letter to his agents, Rose & Shearer, at Airdrie, on 14th February 1888, in which he says—‘Reid has granted a conveyance of the property, and also a trust-deed in favour of Mr Munro and myself, and so soon as the former can be placed on the register the *cessio* proceedings will drop.’ The conveyance was placed on the register on 16th February. Now the diet for the first meeting in the *cessio* had been fixed for the 28th of February, and on 27th February M'Caig writes to Rose & Shearer—‘I will feel obliged by your asking the Sheriff to continue it *sine die*. Reid has executed a trust-disposition and conveyance for behoof of his creditors in favour of Mr D. Munro jr., and myself, and we are endeavouring to wind up the estate under said deed, but we should prefer the *cessio* proceedings being continued, in case it might be necessary to ask the Sheriff to appoint a trustee.’ It is plain that it was not expected or intended by any party concerned that the debtor should lodge his accounts or attend the diet fixed for 28th February; such an idea was utterly inconsistent with the proceedings which were being taken under the trust-deed. What happened on 28th February was that Messrs Rose & Shearer alone appeared before the Sheriff, and instead of asking the Sheriff to continue the diet *sine die*, as directed by M'Caig, they, in the exercise of their discretion, asked the Sheriff to fix 16th March for the adjourned diet. Now, I

do not find the slightest evidence that this adjourned diet was ever made known to the debtor, or to anyone acting for him.

“*Thirdly*, I think it is proved that D. Munro junior, *bona fide* but erroneously, as I think, believed that M'Caig had undertaken to withdraw the *cessio* proceedings altogether, and that he acted on this belief by giving notice to that effect to the debtor and to the creditors. I think it right to note in passing that Munro, though perhaps not so shrewd a man of business as M'Caig, gave his evidence in a straightforward and truthful manner. It appears to me, however, that Munro's mistake in the matter is immaterial, because it is sufficient for the decision of this case that by M'Caig's actings Reid was led to believe that M'Caig would not move in the *cessio* proceedings without further notice. The matter may be tested in this way—Could M'Caig have moved for decree on 28th February in respect of Reid's failure to appear on that day? It is clear that it would have been a gross breach of faith to have done so. But further, as I have said, the understanding of all parties was that Reid should neither lodge a state of his affairs nor appear at that diet.

“*Fourthly*, Reid was not specially cited to the diet of 16th March, at which decree was pronounced, and no intimation of that diet was given to him. Even Munro only heard accidentally that M'Caig was talking of resuming proceedings, but no diet was mentioned.

“*Fifthly*, Reid's failure to appear was not wilful. In the first place, he did not know of the diet; and in the next place, he was in such a state of health that he could not have attended if he had known; and lastly, I cannot doubt that if the diet had been intimated to the witness Martin, who was then acting for him, steps would certainly have been taken to object to decree of *cessio* going out. Whether the objections would have been successful is another matter; but there would have been this at least to say, that Reid's estate had by that time been realised, and that the proceeds were much more than sufficient to meet all his liabilities. It is true that at the time when decree was pronounced, Reid, or at least his family in his name, were disputing the validity of the trust-deed in favour of M'Caig and Munro; but if they had been faced with the alternative of a decree of *cessio*, I cannot doubt that the opposition to the proceedings under the private trust would have been withdrawn, and the consigned money would have been at once available for payment to the creditors.

“Now, if the facts are as I have stated, it only remains to apply the law to them. As to the pursuer's plea that the procedure was disconform to the Cessio Acts, I should hesitate to rest my opinion on the ground that the Sheriff does not state in his interlocutor that he was satisfied that the debtor's failure to appear was wilful, although I think that this should appear on the face of the interlocutor. But I think that it sufficiently appears from the process that the Sheriff had not before him evidence that the debtor had been duly cited to that diet. Reid no doubt was cited to the diet of 28th February, and if he had appeared at that diet he would not have required to be cited to an adjourned diet; but he did not appear at the diet of 28th February, and the petitioning creditors gave an ample explanation

of his non-appearance. Now, I think that, looking to the fact that the procedure was unusual and *extra cursum curiæ* (the *Cessio* Acts and Acts of Sederunt not containing any provisions for an adjournment in such a case), the Sheriff was bound to have seen, before pronouncing decree of *cessio*, that due intimation of the adjourned diet had been given to the debtor.

“But be this as it may, I think that it was contrary to the good faith of the arrangement made by M'Caig on 13th February to move again in the *cessio* without of new citing or giving intimation to the debtor. I do not think that M'Caig acted from any fraudulent motive in taking decree without intimation to the debtor; and further, I do not say that there were not grounds for his wishing to revive the *cessio* proceedings. But he was so intent on obtaining decree and having himself appointed trustee that he appears to have acted in utter forgetfulness or disregard of the interests of the debtor. He was actually present when decree was pronounced, and knowing what he did, he was not entitled to sit silent and allow the Sheriff to pronounce decree on the assumption that Reid's absence was wilful. Mainly on this ground, I think it is impossible to allow the decree so obtained to stand. I arrive at this conclusion with some reluctance, because I think that it was in great part owing to the wrong-headedness of the present pursuer that decree was taken. If she had not impugned the trust in favour of M'Caig and Munro, and had ceded possession of the premises, they would have been handed over to the purchaser, the price would have been available for the creditors, and there would have been no excuse for resorting to the *cessio* proceedings. Besides, on record the charge of impetration is renewed. For those reasons, and others which I need not specify, there must be a material modification of expenses found due to the pursuer.”

The defenders reclaimed, and argued—There had been no informality. The debtor had been properly cited to appear at the meeting of 28th February, and *cessio* could have been competently taken out then. The adjourned meeting was the same as the meeting upon the 28th February, and his absence was therefore wilful.

Counsel for the pursuer was not called on.

At advising—

LORD YOUNG—I think it is very important as regards the future practice in such matters that we should express an opinion upon the case now before us. My opinion upon the matter is quite clear, and it is founded upon section 9 of the Bankruptcy and *Cessio* (Scotland) Act of 1881. The purpose of that section was to provide a sharp remedy against any creditor who was contumacious and wilfully refused to obey the orders of the Court. The words of the section are—“If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful he may in the debtor's absence pronounce decree of *cessio bonorum*.” It is a course taken with the view of preventing a debtor who had been duly cited to attend the diet from contumaciously absenting himself. But he must be duly cited to attend the diet, and there must be no excuse which can reasonably be taken for

his absence; the Sheriff in fact must be satisfied that the debtor is wilfully contumacious. I have no doubt that the Sheriff could adjourn the diet, and that the *cessio* could be granted at the adjourned diet, but then it must be given at a diet called according to the statute—*i.e.*, a meeting to which the creditor had been cited—and the Sheriff must be satisfied that he was wilfully contumacious. I do not think that these things could be predicated of the meeting at which this decree of *cessio* was given. Reid was not duly cited to attend the diet, and so he could not be wilfully contumacious. I think the whole proceedings are inept.

LORD RUTHERFURD CLARK—I do not think it necessary to give a decision as to the wording of the interlocutor of the Sheriff-Substitute, but I wish to state my opinion upon it. If the Sheriff in such a proceeding as this pronounces what is practically a decree in absence, upon the ground that the debtor has wilfully absented himself from the diet of the Court, I think that he should state that in his opinion such is really the case. I do not wish to decide that such a finding in his interlocutor is necessary, but I think that it would be much better if there was such a finding.

LORD LEE concurred.

LORD JUSTICE-CLERK—I quite agree with all that has been said by your Lordships as to the advisability of the Sheriff showing that in his opinion the debtor had wilfully absented himself from the diet of the Court by making some finding in his interlocutor. In this case the Court is of opinion that Reid had not been duly cited to appear upon the 16th March, and therefore the decree of *cessio* must be reduced.

The Court adhered.

Counsel for the Appellants—H. Johnston—Wilson. Agent—James Coutts, S.S.C.

Counsel for the Respondent—Salvesen—A. S. D. Thomson. Agents—Sturrock & Graham, W.S.

Friday, June 7.

## FIRST DIVISION.

DELANEY v. COLSTON AND OTHERS.

*Parent and Child—Custody—Child placed Voluntarily in Charitable Institution.*

In 1882 a father voluntarily placed his three children, aged respectively four years, two years, and a few months, in the hands of the founder and superintendent of a charitable institution for children, who, after keeping them in one of the homes of the institution for a period of four years, removed them in 1886, without the consent of their father, to a property belonging to her in Nova Scotia. In 1884 directors were appointed, but they did not assume the management of the institution until 1887, when the superintendent resigned. In consequence of threatened legal proceedings, the superintendent, on the advice of the direc-